No. 12736

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GLOBE WIRELESS, LTD., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151 et seq.),[1] for enforcement of its order (R. 78–98) issued on March 20, 1950, against respondent, Globe Wireless, Ltd. The Board's decision and order are reported in 88 N. L. R. B. 1262. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices upon which the order is based having occurred at respondent's place of business in San Francisco, California, within this judicial circuit. Respondent concedes that it is engaged in interstate

[1] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 43–49.

commerce within the meaning of the Act, and no question as to the Board's jurisdiction is presented (R. 27; 127–128).[2]

STATEMENT OF THE CASE

Upon charges filed by individual complainants[3] the Board issued its complaint, alleging that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act (R. 3–13).[4] Following the usual proceedings under Section 10 of the Act, the Board rendered its decision and order finding that respondent had violated Sections 8 (a) (1) and (8) (a) (3) of the

[2] Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

[3] Namely, Lorraine E. Conger, Lillie I. Friend, Paul Guerrero, John Gyurcsik, Albert E. Hinde, Charles A. Jones, Virginia Kelso, Violet A. Leach, Jesse E. McLin, Homer E. Mulligan, Rudolph W. Niemi, Malcolm G. Parks, Louis Pena, Sylvia Pottle, Bruce E. Risley, George J. Rosengren, David E. Shaeffer, Pauline Smith, Leslie T. Wheeler, Viola H. Williams.

[4] Although the charges initiating the proceedings were filed by the individual dischargees, respondent in its answer to the complaint (R. 20–22) asserted that the true charging party was the American Communications Association, a labor organization, which had failed to comply with Section 9 (f), (g), and (h) of the Act and had violated Section 8 (b) (1), (2) and 4 (A). The Board held that the Trial Examiner properly struck those defenses. It noted (R. 80, n. 3) that "the provisions of Section 9 (f), (g), and (h) impose no limitation on the filing of charges by individuals, and the fact that the noncomplying union may have assisted members in filing charges is immaterial," citing *Augusta Chemical Co.*, 83 N. L. R. B. 53, subsequently enforced by the Fifth Circuit, 187 F. 2d 63. The Board also observed that "neither noncompliance nor misconduct on the part of the ACA constitutes any defense to the charges here. See *Andrews Company*, 87 N. L. R. B. 379, and *Irwin-Lyons Lumber Co.*, 87 N. L. R. B. 54." The validity of this holding is discussed at pp. 33–37, *infra*.

Act by discharging some 19 employees for having engaged in a lawful economic strike and for being members and active in behalf of a labor organization; and further that respondent had violated Section 8 (a) (1) of the Act by making certain coercive statements to several of its employees (R. 78–91). The order requires respondent to reinstate the discharged employees with back pay; and to cease and desist from interfering with its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and from discouraging membership in labor organizations of its employees by discriminating against them in regard to hire and tenure of employment (R. 91–95).

I. The Board's findings and conclusions

The Board's findings and conclusions and the evidence supporting them may be summarized as follows:

A. The discriminatory discharges

1. *The operators on the afternoon watch*

On January 21, 1949, respondent, a corporation engaged in the transmission of international radio communications, discharged for insubordination Charles E. Jones, an employee who was a member of and active in the American Communications Association, hereinafter referred to as ACA or the Union, a labor organization which had failed to comply with the provisions of Sections 9 (f) (g) and (h) of the Act (R. 26–32, 80).[5] After his discharge Jones went to

[5] The Board found that Jones was discharged for insubordination and not because of his union membership or activities, and that his discharge was lawful (R. 83).

a meeting of the ACA scheduled at 1:30 p. m. for members working on the 4 p. m. to midnight watch, (hereinafter referred to as the afternoon watch) (R. 34; 148–149). At this meeting the members voted to protest Jones' discharge (*ibid*). Accordingly, at approximately 4:30 p. m., shortly after the wireless operators on the afternoon watch had come on duty, Jones and Parks, another employee of respondent, proceeded to respondent's operating room where Parks demanded of Bash, respondent's chief operator, that Jones be reinstated (R. 34; 150, 229, 359–361, 339, 657–660). Bash replied that he himself had not discharged Jones (R. 34; 150, 361).[6] The operators then on duty in the operating room who were members of ACA[7] gathered around Bash, who told them to go back to their circuits (R. 34; 230, 360). None of them did so (*ibid*).[8] Bash reported the matter to McPherson, respondent's district manager (R. 34; 361–362, 419). Shortly after 5 p. m., upon orders from McPherson given a few minutes before, Bash again asked each of the operators to return to his circuit (R. 34–35; 154–155, 362–366). Each replied

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[6] According to Parks and the other employees they then "asked to meet with somebody that had authority to reinstate Jones" (R. 229–230).

[7] Namely, complainants Rudy Niemi, Viola Williams, Bruce Risley, Sylvia Pottle, Pauline Smith, and Al Hinde (R. 228–229, 385–387).

[8] Between the time Bash directed the operators to return to their circuits and the time (shortly after 5 p. m.) when, as hereinafter related, he told them that they were discharged, the operators remained idle in the operating room awaiting an opportunity to lodge a protest with Bash's superior, McPherson (R. 182–184).

in substance that he would do so only when Jones was reinstated (R. 35; 155, 209, 230–233, 256, 365).[9] In accordance with McPherson's instructions Bash then told the operators that they were discharged (*ibid*).

The operators thereupon repaired to McPherson's office (R. 35; 156, 197–198, 208–210). McPherson confirmed their discharge but again offered them the opportunity to return to work (R. 35; 189, 422–424, 428). They repeated their demand that Jones be reinstated as a condition to their returning to work and McPherson told them that they were discharged (*ibid.*). The operators thereupon immediately left respondent's premises (R. 157, 248, 394). A few days later each of them received through the mails a final pay check accompanied by a notice of termination of employment (R. 198, 199, 221).[10]

2. *The operators on the midnight watch*

Another meeting of the ACA was held at 8 p. m. on January 21, attended by members of the midnight to 8 a. m. watch (hereinafter referred to as the mid-

[9] Hinde testified: "I merely stated that I am willing to go back to work but I would rather discuss this grievance first" (R. 274). Parks testified: "We told him we would go back to the circuits when Chuck Jones was reinstated *or a good reason given for his being fired*" (R. 230). [Italics added.] Pottle testified to the same effect (R. 220).

[10] The notice read as follows: "*In view of the termination of your employment*, we hand you herewith your final pay check covering salary through June 22. This check also includes any accrued vacation pay." (R. 199.) [Italics added.] This notice was prepared and mailed on the Monday or Tuesday following the discharge of the operators on Friday, January 21, 1949 (R. 424).

night watch), as well as the employees on the afternoon watch who had just been discharged (R. 35; 157–158, 232–234). It was decided that another protest should be lodged with respondent (*ibid.*). In accordance with this decision, Parks, this time accompanied by Albert Hinde, one of the previously discharged operators, approached Bash in respondent's operating room shortly after midnight (R. 35–36; 233–235, 265–266, 283, 344–348, 444–445, 446, 488). Parks repeated the protest against Jones' discharge and Bash answered that the matter was out of his hands (*ibid.*).[11] The ACA operators on the midnight watch then on duty left their circuits and joined the group around Bash (R. 35–36; 234, 266, 282–286, 368–369).[12] They made it clear that none of them would return to work until Jones was reinstated (*ibid.*). Upon Bash's failure to give any assurance that Jones would be reinstated, they sat around the operating room as had the group in the afternoon (*ibid.*). About an hour later Bash told them that they were discharged and ordered them to leave the premises, which they did (R. 36; 286, 295–296).

Like the operators who were discharged in the afternoon, those on the midnight shift who were thus discharged received through the mail their final pay checks accompanied by notices of termination of their

[11] About 15 minutes after Parks and Hinde arrived at respondent's operating room Bash summoned a building guard and had them ejected from the premises (R. 235, 284, 369).

[12] The operators who joined Parks and Hinde on this occasion were complainants Lorraine Conger, John Gyuresik, Rudy Niemi, Virginia Kelso, John McLin, Homer Mulligan, Louis Pena, Violet Leach, David Shaeffer, and George Rosengren (R. 234, 385–387).

employment (R. 221, 424. See footnote 10, *supra*, p. 5).

3. *The discharge of Guerrero, Wheeler, and Friend*

In addition to the ACA operators on the afternoon and midnight watches, respondent discharged three other ACA operators who were not at work on either January 21 or 22, 1949, namely, complainants Paul Guerrero, Leslie Wheeler and Lillie Friend.

Guerrero: On Saturday evening, January 22, Paul Guerrero, an operator on the 8 a. m. to 4 p. m. watch, had a friend telephone respondent that he could not report for work on Sunday, January 23, because of illness (R. 36; 344–345). When Bash learned that Guerrero had been reported absent because of illness, he telephoned Guerrero and told him to report for work anyway because he (Bash) would not stand for any union tricks (R. 89; 345–346).[13] Bash testified that he told Guerrero to get a doctor's certificate (R. 89; 376). When Guerrero reported for work at 8 a. m. on Monday, January 24, Bash asked him if he had a doctor's certificate (R. 36–37, 89; 347–348, 378). Guerrero replied that he did not and that he had never before been required to have a doctor's certificate for 1 day's absence because of illness (R. 89; 348). Bash immediately discharged him, saying, "I know you are

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[13] Guerrero testified (R. 346):

"A. I kept telling him I was sick, I was sick in bed. He says, well, he says, 'I am not going to stand for none of Barlow's tricks, you show up, you come down and show yourself.' I said, 'Hell, I can't help it.'

"Q. Who was this Barlow he referred to?

"A. The Secretary of the Union."

going to make me reinstate Chuck Jones, now get down there on the bricks with the rest of them and make me do it" (R. 89–90; 348, 378, 379).

Wheeler and *Friend:* Wheeler and Friend were with Guerrero when he was discharged (R. 90; 309, 318). Immediately after he had discharged Guerrero, Bash turned to Wheeler and told him that he was discharged because he had not reported for work the night before (R. 90; 316–320). Before Wheeler could explain his absence, Bash told him to go outside with Guerrero and "try to make him reinstate Chuck Jones, Bruce Risley and company" (R. 90; 320). Bash then ordered Friend to get to work (R. 90; 310). When she began to discuss the various discharges, Bash brusquely told her "to trot along then" (R. 90; 310–311). She then joined Guerrero and Wheeler and all three went down to the picket line which had been established in front of respondent's premises (R. 90; 311).

As in the case of the operators on the afternoon and midnight watches, respondent mailed to Guerrero, Wheeler and Friend notices of the termination of their employment together with their final pay checks (R. 311–312).

4. *The Board's rejection of respondent's defenses*

Upon the facts set forth above, the Board concluded:

(1) That respondent in violation of Section 8 (a) (1) of the Act had discharged Guerrero, Wheeler, Friend, and the operators of the afternoon and midnight watches because they had engaged in a lawful

concerted activity for mutual aid and protection within the meaning of Section 7 of the Act, and

(2) That by discharging the above mentioned employees respondent had discriminated against them in regard to hire or tenure of employment for the purpose of discouraging membership in a labor organization (namely, the ACA), thereby also violating Section 8 (a) (3) of the Act (R. 84–91). The Board in so doing overruled the Trial Examiner on the one ground on which he had held the discharges to be proper. The Trial Examiner, like the Board, held the strike not to have been caused by unfair labor practices, since, as he and later the Board found, Jones had been discharged for cause (R. 32–34, 83). The Trial Examiner concluded therefrom that the strikers were therefore vulnerable to valid discharge (R. 39). The Board, however, pointed out (R. 84, 85) that while "respondent was free to replace such strikers at any time prior to their unconditional request for reinstatement," respondent was *not* "free to discharge the strikers *before* they had been replaced," and that, therefore, their discharges in advance of their having been replaced was in violation of Section 8 (a) (1) and (3) of the Act, "unless there is merit to the respondent's contention that the strike was for an unlawful purpose or otherwise unprotected." The Board after due consideration concluded that the respondent's contentions to the latter effect were without merit.

Respondent first contended that the strike contravened the Federal Communications Act of 1934 and, therefore, was not a lawful concerted activity protected by Section 7. This contention was based on the

assertion that any work stoppage would cause it to discontinue to furnish services, and that this discontinuance would be a violation of the duty to furnish service imposed by Section 501 of the Federal Communications Act.[14] (See 47 U. S. C. 201, 214.) The Board, however, applying the explicit language of that section, held that if respondent's failure to serve, or abandonment of service were caused by a strike, respondent would not be held to have violated its statutory duty and would not be subject to any penalty (R. 86).

Respondent also urged that the strike violated Section 8 (b) (2) of the Act in that its purpose was to compel respondent to discriminate in favor of Jones because of his activity in and on behalf of the ACA. The Board found and the evidence showed, however, that the strikers believed that Jones had been discriminatorily discharged because of his ACA membership and activities and feared similar reprisals against themselves (R. 213–214, 227, 283). Accordingly, the Board held that there was no basis for the assertion that the strikers were seeking to compel respondent to give preference of employment to the active ACA members and adherents or to permit them to engage in insubordination merely because of their union membership (R. 87–88).

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[14] 47 U. S. C. 501: "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly permits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction, be punished * * *."

Respondent further argued that the strike was a sit-down strike and therefore not a lawful concerted activity protected by Section 7 of the Act. The Board found and the evidence showed, however, that, while the employees stood around Bash's desk for about an hour discussing Jones' discharge, they left immediately after they were discharged and did not attempt to hold the premises in defiance of the respondent's right of possession (R. 88; 157, 248, 286, 295–296). The Board, therefore, held that the strike was not a sit-down strike (R. 88).

Finally, respondent contended that the strike was illegal and therefore not a lawful concerted activity protected by Section 7 because the strikers violated a nondiscriminatory company rule by stopping work. The rule upon which respondent relied provided that "the Company reserves the right to discharge, suspend, or otherwise discipline any employee it has reason to believe is failing to perform his work properly" (R. 87; 412). But the Board found, as the evidence showed, that the strikers engaged in a complete work stoppage and were discharged because they chose to strike (R. 87, see *supra,* pp. 4–6). The Board, accordingly, held that the rule which respondent sought to invoke had no application to the facts of the case (R. 87).[15]

[15] In holding that respondent had violated Section 8 (a) (1) and (3) by discharging the strikers, the Board reversed the Trial Examiner, who held that the employer was free to replace the economic strikers prior to their application for reinstatement (R. 39). The Board observed that "it does not follow from this [an employer's right to replace economic strikers] that the Respondent was free to discharge the strikers before they had been re-

B. Respondent's coercive and threatening antiunion statements

When the operators on the afternoon watch left McPherson's office at approximately 5:30 p. m. on January 21, Bash followed Sylvia Pottle and Pauline Smith, two of the operators, into the employees' locker room and engaged Pottle in a conversation (R. 40; 210–211, 248–249). In the course of this conversation Bash told Pottle that respondent "just [had] to get rid of the communists," that ACA would never come back into the plant and that if she were "wise" she would get out of the ACA "while the getting is good" (R. 40–42, 82; 211, 249). Bash made statements of similar nature to several other employees. Thus, he told complainants Conger and Shaeffer that "if you are going to tie yourselves to the tail of this Communist kite [meaning the ACA], you can sink with it" (R. 82; 285, 303). He warned Conger that ACA could not do her any good (R. 83; 280), and counselled her to "remember that it's pretty nice to keep eating, you know" (R. 83; 281). Likewise, he told complainant Kelso that respondent wanted the union out of its offices and that it was starting with "guys like Chuck Jones and Bruce Risley and * * * going on down the line" (R. 83; 297).

The Board found that the statements made by Bash to Pottle, Conger, Shaeffer and Kelso interfered with respondent's employees in the exercise of the rights guaranteed them in Section 7 of the Act;

placed," (R. 84). It found "no basis for concluding, as did the Trial Examiner, that 'any or all of [the strikers] could have had their jobs back at any time before they were filled by new employees'" (R. 85, n. 15).

that each of the statements contained a threat of reprisal and was not, therefore, protected by Section 8 (c) of the Act;[16] and that by such statements respondent violated Section 8 (a) (1) (R. 83).

The Board overruled respondent's contention that the Board could not lawfully find that respondent had violated Section 8 (a) (1) of the Act on the basis of the threats and coercive statements made by Bash to the several employees because the charges (R. 3–8), unlike the complaint (R. 10, 12), alleged only violations of Sections 8 (a) (1) and (3) by certain discharges and did not contain any allegations of violations of Section 8 (a) (1) by threats and coercive statements. The threats and coercive statements were made at or about the time the employees were discharged in January 1949 (R. 40–42; 211, 249, 280, 285, 297, 303). The charges were filed in April 1949 (R. 7), and the complaint, which alleged violations of Section 8 (a) (1) not only by the discharges referred to in the charges but also by threats and coercive statements, was filed in June 1949 (R. 13). The Board held that a complaint may lawfully enlarge upon a charge so as to allege unfair labor practices in addition to those averred in the charge if the additional unfair labor practices were committed within the 6 months' period preceding the filing of the charge (R. 81).

II. The Board's order

On the basis of the foregoing findings and conclusions the Board entered its order requiring respondent

[16] The Board reversed the Trial Examiner who held that the statements were protected by Section 8 (c) (R. 42).

(a) to cease and desist from discouraging membership in labor organizations of its employees by discriminating against them in regard to their hire or tenure of employment and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act; (b) to offer to each of the complainants, except Jones, full and immediate reinstatement to their former or equivalent positions with back pay from the date of the abandonment of the strike to the date on which respondent offers reinstatement; and (c) to post the usual notices (R. 91–98).[17]

QUESTIONS PRESENTED

1. Whether the discharge of employees for striking in protest against the discharge of another employee violates Section 8 (a) (1) and (3) of the Act.

2. Whether the strike in this case violated the Federal Communications Act, or Section 8 (b) (2) of the National Labor Relations Act, as amended, or the employees' contracts of employment.

3. Whether substantial evidence supports the Board's findings that respondent by threatening and coercive statements to its employees violated Section 8 (a) (1) of the Act, and, as a corollary proposition, whether these statements are protected by Section 8 (c) of the Act.

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[17] Following entry of the order, the Board petitioned this Court for enforcement thereof. Respondent moved to remand the case for the taking of additional evidence. This motion is discussed *infra*, pp. 29–40.

4. Whether discharged employees who are members of a union which has not complied with Section 9 (f), (g), and (h) of the Act, are precluded from filing individual charges with the Board.

5. Whether the *discharge* of economic strikers prior to their replacement is an unfair labor practice so that evidence as to their *replacement* following their discharge is irrelevant in a proceeding based upon the illegality of the *discharge*.

6. Whether an employer who has discriminatorily discharged individual employees may validly defend his conduct on the ground that the employees were members of a labor organization which likewise violated the Act.

7. Whether evidence as to the amount of back pay due employees is material in proceedings looking to the enforceability of an order based upon their discriminatory discharge.

SUMMARY OF ARGUMENT

1. The employees who struck in protest against Jones' discharge were economic strikers. Respondent by discharging them for that activity violated Section 8 (a) (1) and (3) of the Act. The strike did not contravene any federal law and was not in breach of contract.

2. The threatening and coercive statements of Bash were likewise violative of Section 8 (a) (1). The failure of the charges to allege this aspect of respondent's misconduct did not preclude the Board from alleging the misconduct in its complaint, issued within six months of the commission of the unfair labor practices.

3. Respondent's motion to remand for the taking of additional evidence should be denied. Evidence as to the Union's misconduct or its failure to comply with Section 9 (f), (g), and (h) is not material in the circumstances of this case. Evidence as to the replacement of the strikers *after* their discharge is likewise immaterial, since the unfair labor practice was complete at the time of the discharge. Evidence as to the abandonment of the strike would be relevant in determining the amount of back pay, if any, due the strikers, but is not relevant in this proceeding which is to determine the validity of the Board's order.

ARGUMENT

I. Respondent's discharge of the employees who struck in protest against the dismissal of Jones violated Sections 8 (a) (1) and (3) of the Act

A. A strike to compel the reinstatement of a discharged employee is protected by the Act

The evidence conclusively shows, as the Board found, that each of the 19 employees ordered reinstated was discharged by respondent. Not only were they told orally that they were discharged, but all of them received written notice of the termination of their employment accompanied by their final pay checks, *supra,* pp. 5, 6. Nor does the record leave any room for doubt that the ACA operators on the afternoon and midnight watches were discharged because they chose to strike in protest against the discharge of Jones. Clearly, when they stopped work they did so for that purpose, *supra,* pp. 4–6. They were ordered back to work, and when their demands were not met they chose to strike.

By striking in protest against the discharge of Jones, the operators were engaging in a concerted activity for mutual aid and protection within the meaning of Section 7 of the Act. *N. L. R. B.* v. *Peter Cailler Kohler Swiss Chocolate Co.,* 130 F. 2d 503, 505 (C. A. 2); *Carter Carburetor Corp.* v. *N. L. R. B.,* 140 F. 2d 714 (C. A. 8). As Judge Learned Hand said in *N. L. R. B.* v. *Peter Cailler Kohler Swiss Chocolate Co., supra:*

> When all other workmen in a shop make common cause with a fellow workman over his separate grievance and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection" although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

Therefore, by discharging the operators for engaging in the strike, respondent clearly violated Section 8 (a) (1) of the Act which makes it an unfair labor practice for an employer to interfere with, restrain or coerce his employees in the exercise of the rights guaranteed them in Section 7 of the Act. *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 347; *N. L. R. B.* v. *Kennametal Inc.,* 182 F. 2d 817 (C. A. 3); *J. A. Bentley Lumber Co.* v. *N. L. R. B.,* 180 F. 2d 641 (C. A. 5); *Gullett Gin Co.* v. *N. L. R. B.,* 179 F. 2d 499 (C. A. 5); *N. L. R. B.* v. *Peter Cailler Kohler*

Swiss Chocolate Co., 130 F. 2d 503 (C. A. 2); *N. L. R. B.* v. *Gulf Public Service Co.*, 116 F. 2d 852, 855 (C. A. 5); *N. L. R. B.* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927, 928 (C. A. 2); *N. L. R. B.* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C. A. 3), certiorari denied, 308 U. S. 605; see also, *Home Beneficial Life Ins. Co.* v. *N. L. R. B.*, 159 F. 2d 280, 284–285 (C. A. 4), certiorari denied, 332 U. S. 758; *N. L. R. B.* v. *Kalamazoo Stationery Co.*, 160 F. 2d 465 (C. A. 6), certiorari denied, 332 U. S. 762; *Carter Carburetor Corp.* v. *N. L. R. B.*, 140 F. 2d 714, 717–718 (C. A. 8). The fact that Jones was discharged for cause and his dismissal was lawful does not in any manner detract from the illegality of respondent's conduct in discharging the strikers, *Firth Carpet Co.* v. *N. L. R. B.*, 129 F. 2d 633, 635–636 (C. A. 2). While, as the Board found, the strike was an economic strike and respondent was therefore entitled to replace the strikers, (cf. *N. L. R. B.* v. *Mackay Radio & Telegraph Co., supra*), respondent could not lawfully discharge the strikers before their places had been filled. *N. L. R. B.* v. *Remington Rand, Inc.*, 130 F. 2d 919, 928 (C. A. 2). As the Court of Appeals for the Second Circuit said in the case just cited:

> Respondent, by its immediate discharge of the strikers and attempted abnegation of the employment relationship, was guilty of an unfair labor practice. It sought to discharge strikers who, under Section 2 (3) of the Act were still its employees and who were thus entitled to apply for reinstatement or at the very least entitled to reinstatement where their jobs remained unfilled.

> Respondent, though it sought to do so, could not deny the right to reinstatement to the striking polishers. Even if there had been no unfair labor practice, respondent could not rely upon its alleged right, if any, to discharge the strikers, because in the instant case, the strikers were discharged without being—or before being—replaced.

Since the operators engaged in a complete work stoppage the doctrine that employees cannot remain at work and at the same time select what part of their allotted tasks they will perform (cf. *N. L. R. B.* v. *Montgomery Ward & Co.,* 157 F. 2d 486, 496 (C. A. 8)) is inapplicable. *Home Beneficial Life Insurance Co.* v. *N. L. R. B.,* 159 F. 2d 280 (C. A. 4), certiorari denied, 332 U. S. 758.

What has been said in reference to the discharge of the operators on the afternoon and midnight watches is also true with respect to the discharge of Guerrero, Wheeler, and Friend. The record shows beyond question that respondent discharged these employees because it was of the belief that they had joined the strike and made common cause with the strikers (*supra,* pp. 7–8). The fact that respondent may have been mistaken in its belief is immaterial. *N. L. R. B.* v. *Link Belt Co.,* 311 U. S. 584, 589–590.

By discharging the strikers respondent also violated Section 8 (a) (3) which makes it an unfair labor practice for an employer to discourage membership in a labor organization by discrimination against his employees in regard to hire and tenure of employment. The record makes it clear, as the Board found, that respondent discharged the strikers

not only because they had engaged in a strike but also because they were members of and active in the ACA. Bash's statements to Guerrero and Wheeler at the time he discharged them (*supra,* p. 8), as well as his statements to Pottle, Conger, Shaeffer and Kelso (*supra* pp. 11–12) establish that anti-union animus motivated the discharges. In any event, it is settled law that discharge of union members for engaging in a strike sanctioned by the union constitutes not only a violation of Section 8 (a) (1) but also of Section 8 (a) (3). *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 345, 347; *N. L. R. B.* v. *Stackpole Carbon Co.,* 105 F. 2d 167, 176 (C. A. 3); *Berkshire Knitting Mills* v. *N. L. R. B.,* 139 F. 2d 134, 140–141 (C. A. 3), certiorari denied, 322 U. S. 747; *N. L. R. B.* v. *Kalamazoo Stationery Co.,* 160 F. 2d 465 (C. A. 6), enforcing, 66 N. L. R. B. 930, 931, certiorari denied, 332 U. S. 762; *American Mfg. Co.,* 5 N. L. R. B. 433, enforced, 106 F. 2d 61 (C. A. 2), affirmed, 309 U. S. 629; *Carter Carburetor Corp.* v. *N. L. R. B.,* 140 F. 2d 714, 718 (C. A. 8); *Western Cartridge Co.* v. *N. L. R. B.,* 139 F. 2d 855, 858 (C. A. 7); *Home Beneficial Life Ins. Co.* v. *N. L. R. B.,* 159 F. 2d 280, 284–285 (C. A. 4), certiorari denied, 332 U. S. 758; *N. L. R. B.* v. *Remington Rand,* 94 F. 2d 862, 871 (C. A. 2), certiorari denied, 304 U. S. 576; *N. L. R. B.* v. *Ohio Calcium Co.,* 133 F. 2d 721, 726 (C. A. 6); *N. L. R. B.* v. *Clinton Woolen Mfg. Co.,* 141 F. 2d 753, 756 (C. A. 6); *N. L. R. B.* v. *Kennametal Inc.,* 182 F. 2d 817 (C. A. 3).

B. The Board properly concluded that the strike was not illegal

Respondent contended that it was justified in discharging the strikers because the strike was illegal. In support of this contention respondent argued the strike was a sit-down strike and was called in violation of (a) the Federal Communications Act, (b) Section 8 (b) (2) of the National Labor Relations Act, and (c) the strikers' contracts of employment. None of these contentions can be sustained.

The strike was obviously not a sit-down strike. While the strikers on the afternoon and midnight watches remained in respondent's operating room for about an hour after Parks' demands for Jones' reinstatement, they left as soon as they were discharged (*supra,* pp. 5, 6). At no time did they claim to hold the premises in defiance of respondent's right of possession. In these circumstances the contention that the strike was a sit-down strike is wholly wanting in merit. *N. L. R. B.* v. *American Mfg. Co.,* 106 F. 2d 61, 68 (C. A. 2).

Respondent's contention that the strike contravened the Federal Communications Act is equally untenable. It is true that that statute prohibits respondent as a licensee from abandoning service to any community without first obtaining a certificate from the Federal Communications Commission (47 U. S. C. 214) and that it imposes upon respondent the duty to serve all without discrimination upon reasonable request (47 U. S. C. 201). It is likewise true that Section 501 of the statute makes it unlawful for any person willfully and knowingly to "cause" or "suffer" to

be done anything declared by the statute to be unlawful, or to "cause" or "suffer" to be omitted anything required by the statute (47 U. S. C. 501). But employees by stopping work and withholding their services do not "cause" or "suffer" a licensee to breach its statutory duties any more than a merchant or manufacturer who refuses to furnish the licensee with essential equipment and supplies. It is too clear for argument that neither the employee nor the supplier, who refuses to furnish the licensee with services or goods, as the case may be, "causes" or "suffers" the licensee to breach its statutory duties, although without those essentials it will be impossible for the licensee to meet its statutory obligations. Those obligations are imposed upon the licensee and not upon third parties vested with the lawful right to withhold their services and property.

The Federal Communications Act does not, either expressly or by implication, confer upon a licensee the right to conscript labor or in any manner restrict the right of employees to strike or to quit work singly or in concert.[18] On the other hand the National Labor Relations Act, a later statute, expressly recognizes the right of employees to strike and to engage in concerted activities for their mutual aid and protection. *International Union, etc.* v. *O'Brien,* 339 U. S. 454. Furthermore, as the Board pointed

[18] This distinguishes the present case from *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, upon which respondent relied in its argument before the Board. The restrictions which the Mutiny Act involved in that case place upon the right of seamen to stop work are not imposed upon employees of licensees under the Federal Communications Act.

out (*supra,* p. 9), the failure of a licensee to perform the obligations prescribed by the Federal Communications would not constitute a breach of such obligations where the failure is caused by a strike.

Like the contention just discussed, respondent's further contention that the strike violated Section 8 (b) (2) of the Act falls of its own weight. The Section invoked by respondent makes it an unfair labor practice for a *labor organization or its agents* to cause or attempt to cause an employer to discriminate *against* an employee in violation of Section 8 (a) (3), which in turn makes it an unfair labor practice for an employer to encourage or discourage membership in a labor organization by discrimination in regard to hire and tenure of employment. Respondent argued before the Board that the purpose of the strike was to compel respondent to discriminate in *favor* of Jones, because of his activities in, and on behalf of ACA and was therefore illegal under Section 8 (b) (2).[19] The short answer to this argument is that the Board found, and the uncontradicted evidence conclusively showed, that the employees engaged in the strike because they believed that Jones had been discriminatorily discharged because of his ACA membership and activities and

[19] It is to be noted that the section is directed only against labor organizations and their agents and that employees, as distinguished from the union of which they may be members, cannot be held to be guilty of an unfair labor practice under the section. *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 181 F. 2d 34, 39 (C. A. 2), certiorari granted, December 11, 1950; *N. L. R. B.* v. *National Maritime Union*, 175 F. 2d 686, 692 (C. A. 2), certiorari denied, 338 U. S. 954.

feared similar reprisals against themselves; and that they were not seeking to compel respondent to give preference of employment to ACA members and adherents or to permit them to engage in insubordination merely because of their union membership.

Respondent's final contention as to the illegality of the strike, namely that the employees struck in violation of their contracts of employment, likewise requires but scant discussion. The employees were employed at will. They had not agreed to refrain from striking. The last collective bargaining agreement between ACA and respondent, which contained a no-strike clause, expired in August 1948 and was expressly repudiated by respondent (R. 316, 322, 325). In contending that the strike was in violation of the strikers' contracts of employment, respondent relied solely upon a provision of a notice which respondent had posted in its operating room reading as follows:

> The Company reserves the right to discharge, suspend or otherwise discipline any employee it has reason to believe is failing to perform his work properly.

Even assuming that an employer by the mere posting of a notice could incorporate a "no-strike" clause into his employees' unwritten contracts of employment, the notice posted by respondent does not purport to accomplish any such purpose.

Since the Board thus properly rejected respondent's contentions as to the alleged illegality of the strike, it follows under the authorities discussed above, pp. 16–20, that respondent's discharge of the strikers violated Section 8 (a) (1) and (3) of the Act.

II. Substantial evidence supports the Board's finding that respondent violated Section 8 (a) (1) by threatening and coercive statements to its employees

As previously related, the Board found and concluded that respondent had violated Section 8 (a) (1) not only by discharging the 19 employees ordered reinstated but also by the threatening and coercive statements made by Bash to Pottle, Conger, Shaeffer, and Kelso; see *supra,* pp. 11–12.[20] In so concluding, the Board adopted the finding of the Trial Examiner that the statements were in fact made.[21] The Board reversed the Trial Examiner's ruling that the statements as a matter of law were within the protection of Section 8 (c) of the Act, holding that each of the statements in question contained a "threat of reprisal" and as such was not within the area permitted under that Section.

We submit that the Board properly found that the statements in question were threatening and coercive. Thus Bash's statement to Pottle that ACA would never come back clearly implied, as the Board found (R. 82), that respondent would resort to any measure necessary to rid itself of the Union. His admonition to get out while the getting was good was an unequivocal warning that respondent intended to discriminate against ACA members, combined with an assurance that if Pottle left

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[20] Bash was clearly a supervisor within the meaning of Section 2 (11) of the Act (R. 375, 377, 812, 869–870, 903). His conduct in making the statements is therefore imputable to respondent. See *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 599; *N. L. R. B.* v. *Pacific Gas & Electric Co.*, 118 F. 2d 780, 786 (C. A. 9).

[21] Bash's denial of his conversation with Pottle raised an issue of credibility which the Trial Examiner and the Board resolved in favor of Pottle. Cf. *Universal Camera Corp.* v. *N. L. R. B.*, 71 S. Ct. 456, 465.

the Union her position would be safe. Likewise, his statement to Conger and Shaeffer that "if you are going to tie yourself to the tail of this Communist kite, you can sink with it," was plainly a warning that respondent intended to oust the ACA and discharge its adherents. Similarly his statement to Kelso that respondent wanted the Union out of its offices and that it was starting with "guys like Chuck Jones and Bruce Risley and * * * going on down the line," was a clear warning to Kelso to disavow the Union or, as he stated to other employees, "sink with it." That statements of this nature constitute an unfair labor practice within the meaning of Section 8 (a) (1) of the Act is too well established to require lengthy citation of authorities. *N. L. R. B.* v. *Virginia Electric & Power Co.,* 314 U. S. 469, 477; *Thomas* v. *Collins,* 323 U. S. 516, 537–538; *N. L. R. B.* v. *Polson Logging Co.,* 136 F. 2d 314 (C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. 2d 780 (C. A. 9); *N. L. R. B.* v. *Gate City Cotton Mills,* 167 F. 2d 647, 649 (C. A. 5). It is of no moment that there is no proof that the coercive remarks did actually intimidate respondent's employees. *N. L. R. B.* v. *Ford,* 170 F. 2d 735, 738 (C. A. 6), *N. L. R. B.* v. *Winona Textile Mills,* 160 F. 2d 201, 206 (C. A. 8); *Western Cartridge Co.* v. *N. L. R. B.* 134 F. 2d 240, 244 (C. A. 7); *N. L. R. B.* v. *Illinois Tool Works,* 153 F. 2d 811, 814 (C. A. 7).

Respondent argued before the Board that since each of the charges filed by the several complainants alleged only that respondent had violated Section 8 (a) (1) and (3) by discharging the complainant and did not allege that respondent had violated Section

8 (a) (1) by threats and coercion, the Board could not lawfully include in its complaint an allegation that respondent had violated the Act by making threatening and coercive statements to its employees.

Before consideration is given to this contention, note should be taken of the fact that even if it is correct, the validity of the Board's order will not be affected. The Board found that respondent had violated not only Section 8 (a) (3) but also Section 8 (a) (1) by discharging the strikers (R. 91), and its order directing respondent to cease and desist from violating Section 8 (a) (1) can rest upon that violation alone. The Board's order is therefore valid in its entirety even if the Board was not authorized to include in its complaint an allegation that the threats and coercive statements violated Section 8 (a) (1) (cf. *N L. R. B.* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4)).

In any case, the contention is without merit. It is well settled that the Board in issuing a complaint is not limited to the violations alleged in the charge. *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 367–369, affirming, 104 F. 2d 655, 657 (C. A. 2); *Consumers Power Co.* v. *N. L. R. B.*, 113 F. 2d 38, 42 (C. A. 6); *N. L. R. B.* v. *American Creosoting Company*, 139 F. 2d 193, 195 (C. A. 6), certiorari denied, 321 U. S. 797; *Fort Wayne Corrugated Paper Co.* v. *N. L. R. B.*, 111 F. 2d 869, 873 (C. A. 7); *N. L. R. B.* v. *Fulton Bag & Cotton Mills*, 180 F. 2d 68, 71 (C. A. 10); *Kansas Milling Co.* v. *N. L. R. B.*, 185 F. 2d 413 (C. A. 10). The charge is merely designed to set "in motion the machinery of an in-

quiry" (*N. L. R. B.* v. *Indiana & Michigan Electric Company,* 318 U. S. 9, 18), and to permit the Board to "enter intelligently upon the exercise of its exploratory powers" (*Consumers Power Co.* v. *N. L. R. B.,* 113 F. 2d 38, 42 (C. A. 6). As the Supreme Court declared in the *Indiana & Michigan* case, "the charge does not even serve the purpose of a pleading" (318 U. S. at 18).[22]

Respondent before the Board relied upon Section 10 (b) of the Act which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge." Even apart from the fact that this limitations proviso does not preclude the Board from including in the complaint violations not alleged in the charge (see *Cathey Lumber Co.,* 86 N. L. R. B. 157, enforced, 185 F. 2d 1021 (C. A. 5)), the proviso was satisfied in this case since the complaint itself was served within six months of the commission of the unfair labor practices alleged therein. Respondent was thus apprised of the charges against it within the limitations period, and the purpose of the proviso was fully satisfied. See *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 348–349; *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 314.

[22] Even the complaint does not set the outer limits of the violations which can be proved. Under Section 10 (b) of both the original and the amended Act the complaint "may be amended by the * * * Board in its discretion at any time prior to the issuance of an order based thereon." See *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, 224–225; *N. L. R. B.* v. *American Creosoting Co.,* 139 F. 2d 193, 195 (C. A. 6), certiorari denied, 321 U. S. 797.

It follows that the Board was authorized to include in its complaint an allegation that respondent had violated Section 8 (a) (1) by other acts and conduct in addition to the discharges. Since the proof established that respondent by Bash's statements, discussed above, violated Section 8 (a) (1) of the Act, the Board's order directing respondent to cease and desist from violating that Section may appropriately rest upon the coercive statements as well as upon respondent's action in discharging employees for engaging in a protected concerted activity.

III. Respondent's motion to adduce additional evidence should be denied

On December 11, 1950, after the filing of the Board's petition for enforcement, respondent moved this Court for an order remanding the case to the Board for the purpose of adducing additional evidence (R. 447–465). This Court on January 8, 1951, denied the motion without prejudice to its renewal at the hearing of the cause on the merits (R. 471). We submit that the motion should now be finally denied.

Respondent in its motion asks leave to adduce additional evidence for the following purposes:

> 1. "to prove that the jobs of the strikers continued available to them up to the time their jobs were filled by new employees;" (R. 451.)
>
> 2. "with respect to the availability to the strikers of employment with Respondent subsequent to the time their jobs were filled by new employees;" (R. 451.)
>
> 3. to prove that Respondent "was ready to deal with the ACA as soon as it would file the non-Communist affidavits [required by Section

9 (h) of the Act] and be certified with Board;" (R. 453.)

4. "with respect to the intolerable tactics of the ACA contingent among its employees in seeking, by job action and strike activity while remaining on the job, to prevent the company from operating its establishment;" (R. 453.)

5. to prove that respondent "was ready to meet with representatives of the strikers at convenient and reasonable times and places to discuss any and all grievances that these persons might have with respect to their conditions of employment;" (R. 453.)

6. As to "the general background of the controversy among its employees as to who should represent them and Respondent's attempts to meet these problems without a violation of the law in the face of the continuous refusal of the ACA to file the non-Communist affidavits and its refusal to accept Respondent's invitation to bargain with it if it represented a majority of its employees" (R. 453–454.)

7. "to prove that ACA was demanding that it be recognized as the sole and exclusive representative in the unit appropriate for collective bargaining purposes at the time when ACA was admitting that it was not the choice of a majority of the employees in such bargaining;" (R. 454.)

8. to refute the Board's findings that "it is necessary to order reinstatement with back pay—in order to effectuate the policies of the Act;" and that "In order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act [it is appropriate to] order the Respondent to cease

and desist from in any manner infringing upon the rights of employees guaranteed by the Act." (R. 454–455.)

All of the foregoing items of evidence are claimed by respondent to be material to the issues attempted to be raised by respondent's Seventh, Eighth, and Ninth affirmative defenses which were striken from respondent's answer. (See R. 451, 454.)[23] In these defenses respondent pleaded that the charges initiating the proceedings before the Board were made and filed by the ACA which had not complied with the requirements of Section 9 (f), (g), and (h) of the Act (R. 20); and that ACA had engaged in unfair labor practices within the meaning of Sections 8 (b) (1), 8 (b) (2), and 8 (b) (4) A of the Act (R. 21–22).

In addition to asking leave to adduce the foregoing items of evidence respondent asks the Court to direct the Board first, "to take evidence as to whether there has ever been an abandonment of the strike and if any evidence be introduced that there has been such abandonment of the strike, to take any evidence respondent may offer with respect to any offer of reinstatement respondent may have made to any of the nineteen strikers" (R. 456); second, "to take any additional evidence that respondent may discover through the taking of depositions of any or all of the chargeable [sic] parties" (R. 457); and third, "to make available to counsel for respondent all statements taken in connection with the investigation of

[23] Contrary to respondent's contention, the first two items of proffered evidence, *supra*, p. 29, lie wholly outside the issues which respondent attempted to raise by its Seventh, Eighth, and Ninth defenses.

this case" and "to issue subpoenas for the taking of such depositions as are requested by respondent after consideration of such statements in the hands of the Board" (R. 457).

We submit that the motion is without merit and should be denied, because all of the evidence sought to be adduced is plainly irrelevant and immaterial in the present proceeding.

1. Replacement of the strikers

The first two items of evidence which respondent asks leave to adduce (*supra,* p. 29) are offered, as respondent's motion shows (R. 451), for the purpose of proving that, "The nineteen strikers were replaced by new, permanent employees while they were on economic strike and while their jobs were available to them if they would give up their demand that Jones be reinstated." In the circumstances of this case, the evidence which respondent thus seeks to adduce is plainly irrelevant and immaterial. It is true that both the Board and the Trial Examiner found that the strike was an economic strike and that respondent ordinarily would have the right to replace the strikers. *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333. But the Board also found on uncontradicted testimony that respondent discharged all of the strikers immediately upon their going on strike. Not only did respondent's witnesses testify that the strikers were immediately discharged but respondent confirmed their discharge in writing. Respondent did not at the hearing, nor does it now, offer to prove that the strikers were not immediately discharged. Nor did either the Board or the Trial

Examiner exclude any proffered evidence on the subject. When respondent discharged the strikers for having engaged in the strike it committed an unfair labor practice within the meaning of Sections 8 (a) (1) and 8 (a) (3) of the Act and the fact that it may have thereafter replaced the strikers while the strike was still in progress is wholly immaterial. See p. 18, *supra*.

2. The ACA, its noncompliance with Sections 9 (f), (g), and (h) and alleged misconduct

Except for evidence relating to the abandonment of the strike and respondent's offers, if any, to reinstate the strikers (R. 456), all of the other items of evidence which respondent asks leave to adduce, (namely, items 3 to 8, inclusive, *supra,* pp. 29–30) relate to the ACA, its noncompliance with Sections 9 (f), (g), and (h) and its alleged tortious conduct. This evidence was offered at the hearing before the Trial Examiner in support of the allegations contained in respondent's Seventh, Eighth, and Ninth defenses. (See *supra,* p. 2, n. 4.) These defenses were properly stricken and evidence in support of them properly excluded.

The charges initiating the proceeding were not executed by the ACA but by individual employees. Neither the complaint nor the charges alleged the commission of any unfair labor practices as against the ACA. The only unfair labor practices with which respondent was charged were that it had interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by Section 7 of the Act and had discriminated against its em-

ployees in regard to hire and tenure of employmen because of their union activities. No relief was aske either by the complaint or by the charges for th ACA but only for the individual employees. No did the Board find that respondent had been guilt of any unfair labor practices insofar as the ACA wa concerned or award any relief to that organization.[24]

Under the Board's order respondent is not required to recognize or bargain with the ACA or to deal with it in any way. In these circumstances, it is manifest that the evidence which respondent asks leave to adduce in respect to the ACA, its failure to meet the requirements of Section 9 (f), (g), and (h), its alleged misconduct, and respondent's dealings with it lies wholly outside the issues of this case.

Sections 9 (f), (g), and (h) deny access to the Board's processes to labor organizations which have failed to comply with their requirements. They do not deny to individuals the right to invoke the Board's jurisdiction for the purpose of obtaining relief for their own benefit and not for the benefit of a noncomplying union. If the charges were filed for the benefit of the ACA, the General Counsel would have promptly dismissed the proceedings. *White* v. *Douds,* 80 F. Supp. 402 (S. D. N. Y.); *White* v. *Herzog,* 80 F. Supp. 407 (D. C. D. C.); National Labor Relations Board, Fourteenth Annual Report (Government Printing Office, 1950) pp. 15–16. But no such case

[24] Contrary to respondent's assertion, the Board made no findings on any issues as to which the Trial Examiner had excluded evidence.

is presented here. No relief was sought for the ACA and none was granted. Evidence as to the noncompliance of the ACA with the requirements of Sections 9 (f), (g), and (h) is therefore irrelevant.

Contentions identical to that advanced by respondent here have recently been rejected by the Courts of Appeals for both the Fifth and Third Circuits. *N. L. R. B.* v. *Augusta Chemical Co.*, 187 F. 2d 63, 2350, 2351 (C. A. 5); *N. L. R. B.* v. *Clausen*, 27 L. R. R. M. 2537, 2540 (C. A. 3). The courts in both cases squarely held that the Board may proceed upon charges made by individual employees even though the employees may be assisted, or even directed, in the making of the charge by a labor organization which is itself ineligible under Section 9 (f), (g), and (h) of the Act to make a valid charge.[25]

[25] As suggested by the Court of Appeals for the Fourth Circuit in *N. L. R. B.* v. *Greensboro Coca-Cola Bottling Co.*, 180 F. 2d 840, 845–846, it may be doubted that an employer has such interest in a union's compliance with Section 9 (f), (g), and (h), as would authorize the employer to raise any question concerning compliance. The object of the filing requirements is to secure for employees and the public the benefits which inure from encouraging operational and financial responsibility of labor organizations (Section 9 (f) and (g), *N. M. U.* v. *Herzog*, 78 F. Supp. 146, 156–160 (D. of Col., three-judge court), affirmed, 334 U. S. 854), and from minimizing the danger of political strikes (Section 9 (h), *American Communications Association* v. *Douds*, 339 U. S. 382). The means adopted to achieve this end is the denial of the Board's facilities to a noncomplying labor organization. The opportunity which noncompliance affords an employer to violate the National Labor Relations Act is but an incidental windfall which flows from but is not the legislative purpose behind the method adopted to achieve the general object. Hence, it has none of the aspects of an independent right accorded the employer, and was not intended to have them. Consequently, it would seem that respondent has no standing to raise any question concerning com-

Evidence as to the alleged unfair labor practices in which the ACA is claimed to have engaged, as well as evidence of other misconduct on the part of the ACA, is likewise immaterial. Section 8 (b) of the Act declares certain acts and conduct on the part of labor organizations and their agents to be unfair labor practices. But that section applies only to labor organizations and their agents. It does not apply to members of such organizations.

As Senator Taft explained to the Senate a labor union under the Act is treated as an entity "exactly like a corporation" (93 Daily Cong. Rec. 4142). Consequently, unfair labor practices and other misconduct on the part of a labor organization cannot be imputed to its members merely on the basis of their membership alone, any more than the torts of a corporation can be imputed to its stockholders. 93 Daily Cong. Rec. 4561; *N. L. R. B.* v. *Ohio Calcium Co.,* 133 F. 2d 721, 726 (C. A. 6); *N. L. R. B.* v. *Quality Service Laundry,* 131 F. 2d 182, 183 (C. A. 4); *Tyne Company* v. *N. L. R. B.,* 125 F. 2d 832, 835 (C. A. 5); *Stewart Die Casting Co.,* v. *N. L. R. B.,* 114 F. 2d 849 (C. A. 7), certiorari denied, 312 U. S. 680. Nor does the fact that a labor organization has engaged

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pliance because its interest is nothing more "than a general interest in the proper execution of the laws" and does not "rise to the dignity of an interest personal to [it] and not possessed by the people generally." *Stark* v. *Wickard*, 321 U. S. 288, 304, and cases cited. Cf. also *Grossman* v. *Young*, 72 F. Supp. 375 (S. D., N. Y.); *Benisch* v. *Cameron*, 81 F. Supp. 882 (S. D., N. Y.); *Millikan* v. *Security Trust Co.*, 187 Ind. 307, 118 N. E. 568, 570; *Salina Canyon Coal Co.* v. *Klemm*, 76 Utah 372, 290 P. 161, 166–167; and *West Texas Utilities Co.* v. *N. L. R. B.*, 184 F. 2d 233, 239 (C. A. D. C.).

in unfair labor practices or other tortious conduct justify an employer in engaging in unfair labor practices against individual members who have not participated in the misconduct of their union. The evidence which respondent asks leave to adduce relates only to unfair labor practices and other misconduct on the part of the ACA and not to unfair labor practices or other illegal conduct engaged or participated in by the individual employees. It is therefore plainly irrelevant.

3. The abandonment of the strike and respondent's offers of reinstatement

The Board's order requires respondent to reinstate the 19 strikers with back pay from the date of the abandonment of the strike to the date respondent offers to reinstate them. Asserting that there is no evidence in the record on the subject, respondent asks the Court to direct the Board to take evidence as to whether the strike has been abandoned and as to whether respondent has offered to reinstate them. Such evidence is clearly irrelevant in this proceeding. If the strike has not yet been abandoned, then respondent's liability for back pay has not yet accrued. If respondent has offered to reinstate the strikers, then its liability ceased as of the date of the offer. Such being the case, evidence as to the abandonment of the strike and respondent's offer, if any, to reinstate the strikers would become relevant only if a decree of enforcement is entered and subsequent proceedings are brought to compel respondent to comply with the decree. In such subsequent proceedings the evidence which respondent now asks leave to adduce would be relevant. But it is clearly not relevant at

the present stage of the proceeding. Matters which relate only to whether or not the Board's order has been complied with cannot be litigated in proceedings to enforce the order. *N. L. R. B.* v. *Mexia Textile Mills,* 339 U. S. 563, 567, 569; *N. L. R. B.* v. *American Potash & Chemical Corp.,* 98 F. 2d 488, 493 (C. A. 9); *N. L. R. B.* v. *Bradley Washfountain Co.,* 27 L. R. R. M. 2520 (C. A. 7, decided Mar. 21, 1951).

4. Respondent's alleged right of discovery

In addition to asking leave to adduce additional evidence respondent requests the Court to order the Board to make available to respondent's counsel "all statements taken in connection with the investigation of this case," to permit the respondent to take the depositions of any and all of the complainants and "to issue subpoenas for the taking of such depositions as are requested by respondent after consideration of such statements in the hands of the Board." This request is without shadow of validity on this review. It is obviously not a motion for leave to adduce additional evidence within the meaning of Section 10 (e) or one addressed to any power possessed by a court of review under the National Labor Relations Act or the Administrative Procedure Act. For this reason alone the motion should be denied.

But independently of the foregoing, the motion insofar as it calls for the production of statements and the taking of depositions is plainly without color of merit.

(a) In asking the Court to direct the Board to produce "all statements taken in connection with the investigation of this case," respondent is asking the

Court to substitute itself for the General Counsel and the Board as the tribunal primarily responsible for the conduct of the Board's hearing. The matter of what documents shall be produced and which witnesses shall be called is the responsibility of the General Counsel as an aspect of the conduct of his prosecution of the case. Any statements taken by representatives of the General Counsel in preparing the case are in his custody, and not in the possession of the Board or the Trial Examiner. The case is heard by the Trial Examiner and the Board upon the record presented by the General Counsel and the respondent, and not upon matters in the files of either party. Consequently in asking the Court to direct the Board to produce "all statements taken in connection with the investigation of this case", respondent is asking that the Board be directed to produce matters not in its possession.

If respondent wished the Board or the Trial Examiner to direct the General Counsel to produce any such statements, its request comes too late. Under the Board's Rules and Regulations any such request must be made initially to the Trial Examiner presiding at the hearing and, unless the rules of the Board permit a special appeal from the Trial Examiner before the close of the hearing, is reserved for consideration by the Board on exceptions to the intermediate report;[26] it does not become a matter for the cognizance of the Court of Appeals except after adverse ruling by the Board and only in connection with the review of a final order of the Agency. Section 10 (c) of the Act and Section 10 (c) of the

[26] Section 203.26 of the Board's Rules and Regulations; 12 Fed. Reg. 5656, 13 Fed. Reg. 4872.

Administrative Procedure Act. Here there was no request made for the production of the statements. Further, the request if made would have been without merit since none of the statements were shown to be material or at variance with testimony given by the persons making them. *Boske* v. *Comingore,* 177 U. S. 459; *United States* v. *Ragen,* 180 F. 2d 321, 327 (C. A. 7); *United States* v. *Krulewitch,* 145 F. 2d 76, 79 (C. A. 2). The demand now made by respondent for the production of the statements cannot therefore be sustained.[27]

(b) Respondent renews its request, previously denied by the Regional Director and the Trial Examiner, for the taking of depositions of complainants. Nothing in the statute confers any right upon a respondent to take depositions of the charging parties prior to the hearing. At the hearing the Trial Examiner expressly advised respondent that if it desired to take the testimony of any person not present, the Trial Examiner would entertain an application for a subpoena (R. 102). No such application was ever made. Under the circumstances respondent suffered no prejudice from the action of the Board. Cf. *N. L. R. B.* v. *Ed. Friedrich, Inc.,* 116 F. 2d 888, 889 (C. A. 5). The relevant facts were fully developed at the hearing, and no purpose would now be served in granting respondent's request that the Board take "any additional evidence that respondent *may discover* through the taking of depositions" (R. 457, italics supplied).

[27] Section 203.90 of the Board's Rules and Regulations are substantially the same as the regulation involved in the *Boske* and *Ragen* cases.

CONCLUSION

The motion to remand should be denied and the order of the Board should be enforced.

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APRIL 1951.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. I, Secs. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

SEC. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

SEC. 9. * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees raised by a labor organization under subsection (c)

of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of the section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constitute unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such years;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization of strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in in-

surance or other benefit plans, and (l) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor

organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

SEC. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. * * * Any such complaint may be amended * * * at anytime prior to the issuance of an order based thereon. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if

all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief, or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection, shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken

before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

The relevant provisions of the Communications ct of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 064, 47 U. S. C., secs. 151, *et seq.*) are as follows:

SEC. 201 (a). It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor * * *

* * * * *

SEC. 214 (a). * * * No carrier shall discontinue, reduce, or impair service to a community or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby * * *

* * * * *

SEC. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than 2 years, or both.

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